No. 80-1102

IN THE

Supreme Court of the United States

October Term, 1980

LAWRENCE LUNG, ET AL.,
Appellants,

v.

FRED L. O'CHESKEY, ET AL.,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	i
ARGUMENT	2
CONCLUSION	11
CERTIFICATE OF SERVICE	12

TABLE OF AUTHORITIES

Cases

Anderson v. Tiemann, 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question*, 390 U.S. 714 (1967) . 6, 11

Austin v. New Hampshire, 420 U.S. 656 (1975) . . . 7, 8, 10

Baldwin v. Fish & Game Commission of Montana, 436 U.S. 371 (1978) 10

Berry v. State Tax Commission, 241 Ore. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question*, 382 U.S. 16 (1965) . . . 5

Central Machinery v. Arizona State Tax Commission, ____ U.S. ____, 100 S.Ct. 2592 (1980). 4

Davis v. Franchise Tax Board, 139 Cal.R. 797, 71 Cal.App.3rd 998 (1977), *appeal dismissed for want of a substantial federal question*, 434 U.S. 1055 (1978). 5, 10

Edelman v. Jordan, 415 U.S. 651 (1974). 4

Goodwin v. State Tax Commission, 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *aff'd mem.*, 1 N.Y.2d 680, 150 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question*, 352 U.S. 805 (1956). 5, 10

Hicks v. Miranda, 422 U.S. 332 (1975) 4

Page

Howard v. Commissioners of Sinking Fund, 344 U.S. 624 (1953) 5

Kiker v. City of Philadelphia, 31 A.2d 289 (Penn. 1943), *cert. denied*, 320 U.S. 741 (1943) 3

Kingsley Int. Pic. Corp. v. Regents of N.Y.U., 360 U.S. 684 (1959) 10

McClanahan v. State Tax Commission of Arizona, 411 U.S. 164 (1973) 4

Meek v. Pettenger, 421 U.S. 349 (1975) 4

Mobil Oil Corp. v. Commissioner of Taxes, 445 U.S. 725 (1980) 9

Moorman Mfg. Co. v. Bair, 437 U.S. 267 (1978) 9

Nonresident Taxpayers Association v. Municipality of Philadelphia, 341 F. Supp. 1135 (D.N.J. 1971), *aff'd*, 406 U.S. 951 (1972) 6

Nonresident Taxpayers Association v. Municipality of Philadelphia, 341 F.Supp. 1139 (D.N.J. 1971), *aff'd*, 406 U.S. 951 (1972) 6

Richardson v. Ramirez, 418 U.S. 24 (1974). 4

Salomon v. State Tax Commission, 278 U.S. 484 (1929) 11

Shaffer v. Carter, 252 U.S. 37 (1920) 2, 5, 8, 10

State ex rel. Appleby v. District Court, 46 N.M. 376, 129 P.2d 338 (1942) 3

State of Alaska v. Petronia, 69 Wash.2d 640, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question*, 389 U.S. 7 (1967) . 3, 4, 6, 7

Stephen v. State Tax Commissioner, 245 A.2d 552 (Del. 1968), *appeal dismissed*, 394 U.S. 573 (1968). . . . 6

Thomas v. Gay, 169 U.S. 264 (1898) 3

Travis v. Yale & Towne Mfg. Co., 252 U.S. 60 (1920). . 2, 5, 8

Warren Trading Post v. Arizona State Tax Commission, 380 U.S. 685 (1965) 4

Page

White Mountain Apache Tribe v. Bracker, ____ U.S. ____, 100 S.Ct. 2578 (1980) 4

Wilson v. Department of Revenue, 267 Ore. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question*, 416 U.S. 964 (1974) . . 5

Wisconsin v. J. C. Penney, 311 U.S. 435 (1941) 2

Statutes (United States Code):

Buck Act, 4 U.S.C. Section 104, *et seq.*, (1977) 4

10 U.S.C. Section 2671 (1975) 3

16 U.S.C. Section 457 (1974) 3

Federal Assimilative Crimes Act, 18 U.S.C. Section 13 (1969) 3

26 U.S.C. Section 3305 (1979) 3

I.R.C. Section 3, 26 U.S.C. Section 3 (1979 Supp.). . . . 9

I.R.C. Section 63, 26 U.S.C. Section 63 (1979 Supp.). . . 9

40 U.S.C. Section 290 (1969) 3

New Mexico Statutes:

Sections 7-2-1 through 7-2-22 NMSA (1978) 8

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ON APPEAL FROM THE SUPREME COURT OF NEW MEXICO

MOTION TO DISMISS OR AFFIRM

The Appellee moves the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment of the Supreme Court of New Mexico, on the ground that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

ARGUMENT

The heart of Appellants' contentions is that New Mexico's Income Tax Act infringes upon their rights guaranteed by the Due Process, Equal Protection, Commerce and Privileges and Immunities Clauses of the United States Constitution.

Since 1920, these contentions have been firmly settled against Appellants:

> The very fact that a citizen of one state has the right to hold property or carry on an occupation or business in another is a very reasonable ground for subjecting such nonresidents, although not personally, yet to the extent of his property held, or his occupation or business carried on therein, to a duty to pay taxes not more onerous in effect than those imposed under like circumstances upon citizens of the latter state.
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> *Shaffer v. Carter*, 252 U.S. 37 (1920).

In both *Shaffer v. Carter, supra,* and its companion case, *Travis v. Yale & Towne Mfg. Co.*, 252 U.S. 60 (1920), the Court established the rule that, absent a discriminatory effect, imposition of a state income tax on income of a nonresident from sources within the taxing state violates neither the Due Process, Equal Protection, Privileges and Immunities or Commerce Clauses of the United States Constitution.

The constitutional strictures imposed upon a state in its power to tax are not rigid:

> A state is free to pursue its own fiscal policies, unembarrassed by the Constitution, if by the practical operation of a tax the state has exerted its power in relation to opportunities which it has given, to protection which it has afforded, to benefits which it has conferred by the fact of being an orderly, civilized society.
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> *Wisconsin v. J. C. Penney*, 311 U.S. 435 (1941).

Without citing any favorable precedent, Appellants interpret this famous due process language to require a "fiscal relation" between the amount of taxes exacted from a taxpayer and the amount of benefits accruing especially to him. The courts have never required the state to return to a taxpayer tangible benefits or services in direct proportion to the amount of tax dollars paid. *State of Alaska v. Petronia,* 69 Wash.2d 640, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question,* 389 U.S. 7 (1967); *Thomas v. Gay,* 169 U.S. 264 (1898).

Moreover, contrary to assertion of Appellants, substantial benefits are provided each of them by the State of New Mexico. The obvious and primary benefit is that each of them is employed within the state.[1] When they leave their homes each day, they travel as safely as New Mexico citizens, secure in their knowledge that they travel in civilization, governed by laws which protect them as well as their New Mexico brothers and sisters.[2] Nonresidents share in the entitlement of residents to obtain judicial relief for wrongs done them in New Mexico.[3] The holding of the Supreme Court of New Mexico – that the intangible benefits derived from the "fruits of civilization" and the "opportunity to exercise intelligence, skill, and labor while employed in the State of New Mexico" are sufficient to justify

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1 See *Kiker v. City of Philadelphia,* 31 A.2d 289 (Penn. 1943), *cert. denied,* 320 U.S. 741 (1943).

2 Even on the federal reservation, state laws govern by specific act of Congress: under the Federal Assimilative Crimes Act, 18 U.S.C. Section 13 (1969), acts not punishable by any enactment of Congress are punishable by the then effective laws of the state in which the enclave is situated; state workmen's compensation laws protect those working within a federal enclave, 40 U.S.C. Section 290 (1969), as do state wrongful death and tort laws, 16 U.S.C. Section 457 (1974); state unemployment compensation laws apply within a federal enclave, 26 U.S.C. Section 3305 (1979); state fish and game laws also apply within the federal enclave, 10 U.S.C. Section 2671 (1975).

3 *State ex rel. Appleby v. District Court,* 46 N.M. 376, 129 P.2d 338 (1942).

imposition on nonresidents of an income tax – was mandated by the case law. *State of Alaska v. Petronia, supra.*[4]

Appellants' attempt to analogize this case to cases governing imposition of state taxes on Indian reservations is inappropriate. Both cases cited by Appellants concerned whether or not state taxation of receipts from on-reservation activities was barred by the preemption doctrine, not whether the Commerce Clause or the Fourteenth Amendment barred imposition of the tax. *White Mountain Apache Tribe v. Bracker,* ____ U.S. ____, 100 S.Ct. 2578 (1980); *Central Machinery v. Arizona State Tax Commission,* ____ U.S. ____, 100 S.Ct. 2592 (1980). No preemption argument is raised by these appellants, and even if it had been, standards for preemption developed in Indian cases would not be applicable in this non-Indian context. *White Mountain Apache Tribe v. Bracker, supra.*

Far from preempting the states from imposing income taxes on federal areas, Congress has affirmatively granted to each state the power to impose its income taxes on income earned in federal areas located within the borders of the state by its adoption of the Buck Act, 4 U.S.C. Section 104, *et seq.* (1977), which provides comprehensive federal guidance for state taxation of those living within federal areas. *McClanahan v. State Tax Commission of Arizona,* 411 U.S. 164 (1973). The Buck Act expressly excepts Indians from its application. 4 U.S.C. Section 109; *McClanahan v. State Tax Commission of Arizona, supra; Warren Trading Post v. Arizona State Tax Commission,* 380 U.S. 685, at 691, fn. 18 (1965). The Buck Act has been interpreted by this Court to allow a state to tax earnings from

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[4] A decision by this Court to dismiss an appeal from a state court on the grounds that the constitutional challenge is not a substantial one is a decision on the merits, binding on the lower courts until reversed by the Supreme Court. *Hicks v. Miranda,* 422 U.S. 332 (1975); *Meek v. Pettenger,* 421 U.S. 349 (1975); *Edelman v. Jordan,* 415 U.S. 651 (1974); *Richardson v. Ramirez,* 418 U.S. 24 (1974).

a federal reservation within its boundaries "just as if the Federal Government were not there." *Howard v. Commissioners of Sinking Fund,* 344 U.S. 624, at 628 (1953).

Taxpayers erroneously argue that this Court has never addressed the merits of its arguments concerning the limits of the state's power to tax the income of a nonresident from sources within the state. In addition to laying to rest the ultimate questions in *Shaffer v. Carter, supra,* and *Travis v. Yale & Towne Mfg. Co., supra,* this Court has had the opportunity on numerous occasions to consider the multitude of variations on the theme, and has dealt with the issues summarily.

This Court reviewed New York's statute allowing residents certain deductions from income not allowed to nonresidents, and limiting deductions for nonresidents to those connected with the production of income within the state; the Court determined that the case presented no substantial federal question.[5] Similar provisions in Oregon's income tax statute were raised by appeal, and summarily dismissed.[6] An appeal from the holding of the California Supreme Court that California's statute denying nonresidents the option of income averaging does not violate the Privileges and Immunities Clause, was similarly disposed of.[7] An appeal from a decision of the Nebraska

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5 *Goodwin v. State Tax Commission,* 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *aff'd mem.,* 1 N.Y. 2d 680, 150 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question,* 352 U.S. 805 (1956).

6 *Wilson v. Department of Revenue,* 267 Ore. 103, 514 P.2d 1334 (1973), *appeal dismissed for want of a substantial federal question,* 416 U.S. 964 (1974); *Berry v. State Tax Commission,* 241 Ore. 580, 397 P.2d 780 (1964), *appeal dismissed for want of a substantial federal question,* 382 U.S. 16 (1965).

7 *Davis v. Franchise Tax Board,* 139 Cal.R. 797, 71 Cal.App.3rd 998 (1977), *appeal dismissed for want of a substantial federal question,* 434 U.S. 1055 (1978).

Supreme Court, holding proper the limitation to residents only of Nebraska's "food sales tax credit" against income taxes, was summarily dismissed by this Court.[8] Alaska's income tax was challenged, as violating various constitutional provisions as applied to nonresidents; the appeal was dismissed by this Court for want of a substantial federal question.[9] This Court summarily affirmed the decision of a New Jersey federal district court holding that city and state income taxes, when applied to nonresidents working in a naval shipyard, did not violate the Due Process, Equal Protection, Privileges and Immunities or Commerce Clauses of the United States Constitution or the civil rights of the plaintiffs,[10] and, further, that these arguments did not even present a substantial federal question.[11] This Court also summarily rejected the arguments of taxpayers that nonresidents should be allowed a reduction in the amount of income taxes paid to a state, to reflect the reduced benefits provided by the state to nonresidents.[12]

The question presented in *State of Alaska v. Petronia, supra,* is most pertinent to the present case. That was an action by the Alaska Attorney General, in the courts of Washington, to collect payment of income taxes from seamen, whose duties were performed exclusively onboard ship, relating principally to operation and maintenance of their employer's vessel. Although a substantial portion of the seamen's pay was earned within

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8 *Anderson v. Tiemann,* 182 Neb. 393, 155 N.W.2d 322 (1967), *appeal dismissed for want of a substantial federal question,* 390 U.S. 714 (1967).

9 *State of Alaska v. Petronia,* 69 Wash.2d 460, 418 P.2d 755 (1966), *appeal dismissed for want of a substantial federal question,* 389 U.S. 7 (1967).

10 *Nonresident Taxpayers Association v. Municipality of Philadelphia,* 341 F.Supp. 1139 (D.N.J. 1971), *aff'd,* 406 U.S. 951 (1972).

11 *Nonresident Taxpayers Association v. Municipality of Philadelphia,* 341 F.Supp. 1135 (D.N.J. 1971), *aff'd,* 406 U.S. 951 (1972).

12 *Stephen v. State Tax Commissioner,* 245 A.2d 552 (Del. 1968), *appeal dismissed,* 394 U.S. 573 (1968).

the boundaries of the State of Alaska, the seamen never stepped on shore except as tourists, nor were their employers Alaskan residents. Similarly to these Texas residents, those seamen argued that they received no benefits, or minimal benefits, from Alaska, that the only benefit received – the right to fish in Alaska's coastal waters – was granted by the federal government, not by Alaska, and that the Alaska tax therefore violated the Due Process and Commerce Clauses. The Washington Supreme Court held the income earned while in Alaska waters was properly taxable by Alaska, finding the wages received by the seamen were the benefit justifying the tax:

> The business productivity generated by Alaska was accountable for the wages earned by the defendants when they were in Alaskan waters .... We are satisfied that the benefits of employment afforded by this economic activity of the state of Alaska constitutes minimum connections within the rule to avoid a denial of due process under the Fourteenth Amendment to the United States Constitution.
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> *State of Alaska v. Petronia*, 418 P.2d at 758.

This Court determined the seamen's appeal from that holding did not raise a substantial federal question. 389 U.S. 7 (1967).

Additionally, these appellants argue in Section B of the jurisdictional statement that New Mexico allows lower exemptions to nonresident taxpayers than to residents and that therefore they are the subjects of discrimination in violation of the Privileges and Immunities Clause. Undeniably, the rights secured to all citizens by the Privileges and Immunities Clause are jealously guarded by the decisions of this Court. In the context of local taxes, this Court's decisions reflect careful scrutiny of those statutes distributing tax burdens on the basis of residence or nonresidence, to determine whether additional tax burdens have been unreasonably imposed upon nonresidents. *Austin v. New Hampshire*, 420 U.S. 656 (1975). The appropriate test is "the practical effect and operation" of the tax,

Shaffer v. Carter, supra, the "concrete, the particular incidence" of the tax, *Travis v. Yale & Towne Mfg. Co., supra; Austin v. New Hampshire, supra.*

Thus, an examination of the particulars of New Mexico's taxing structure is critical to the inquiry. New Mexico imposes its tax directly on "federal taxable income."[13] No statutory deductions are allowed, nor are there any exemptions applicable to these plaintiffs.[14] The exemptions described by appellants are those allowed under the Internal Revenue Code.[15] Net compensation of a nonresident is then allocated to this state to the extent it is paid "for activities, labor or personal services within this state." Section 7-2-11(D) NMSA (1978).

The amount statutorily allocated to New Mexico is not the gross wages earned here, nor is the amount allocated out-of-state a gross income figure. Before allocation, a taxpayer's entire gross income is reduced by his federal deductions and exemptions. Therefore, income allocated is net income. Obviously, a

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13 Section 7-2-2(S) NMSA (1978); amounts it is prohibited from taxing either by local or federal law are excluded, Section 7-2-2(T) NMSA (1978).

14 The exemptions provided in the income tax are found at Section 7-2-4 NMSA (1978) for banks, insurance companies and similar organizations, pension trusts, and not for profit organizations; Section 7-2-5 NMSA (1978) for certain civil service annuities; Section 7-2-6 NMSA (1978) for annuities for retired judges; and Section 7-2-5.1 NMSA (1979 Supp.) for certain military retirement pay.

15 Taxpayer's argument is obviously based on the New Mexico income tax return form, rather than the New Mexico income tax law, and demonstates a misunderstanding of the New Mexico income tax, which appears at Sections 7-2-1 through 7-2-22 NMSA (1978). An examination of the act reveals that the tax is imposed directly upon "federal taxable income." However, a nonresident must list federal deductions and exemptions on the form and subtract them from his total federal adjusted gross income. This computation is necessary to arrive at the figure which is known as federal "taxable income," and consequently New Mexico "base income."

Cont. on p. 9

taxpayer does not take the full amount of his federal exemptions out of the amount allocated to only one state. It is this resulting allocation of federal exemptions and deductions of which these taxpayers complain. Appellants want the formula to allocate gross income, then allow subtraction of all their federal deductions and exemptions from the gross income amount attributable only to New Mexico.

Allocation and apportionment formulas have been reviewed by this Court on numerous occasions. It is not at all uncommon for the state law to require allocation or apportionment of a federal net income figure. See e.g., *Mobil Oil Corp. v. Commissioner of Taxes,* 445 U.S. 725 (1980); *Moorman Mfg. Co. v. Bair,* 437 U.S. 267 (1978). There is no constitutional defect in requiring allocation of a net income figure, or in requiring allocation and apportionment of federal exemptions and deductions in relation to the amount of total federal taxable income attributable to the taxing state. *Mobil Oil Corp. v.*

Cont. from p. 8

Section 7-2-2(S) NMSA (1978). Those figures would have come from that line on the federal return form 1040 which shows federal "taxable income," except that the federal return no longer requires calculation of federal "taxable income." The Internal Revenue Code now provides for calculation of individual income taxes based upon a tax table. I.R.C. Section 3, 26 U.S.C. Section 3 (1979 Supp.) "Tax table income" is defined in Section 3(a)(4) as adjusted gross income reduced by the excess itemized deductions and increased by the unused zero bracket amount. However, "taxable income" is defined to mean adjusted gross income reduced by excess itemized deductions and deductions for personal exemptions, and increased by the unused zero bracket amount. I.R.C. Section 63, 26 U.S.C. Section 63 (1979 Supp.). Thus, the amount actually reported by individuals for federal income tax purposes is a different amount than the amount required to be reported as federal "taxable income" for state income tax purposes, and the state has had to reconstruct those calculations on its form in order to come up with the appropriate tax base.

Commissioner of Taxes, supra; see also, *Goodwin v. State Tax Commission,* 146 N.Y.S.2d 172, 286 App.Div. 694 (1955), *Aff'd mem.,*1 N.Y.2d 680, 15 N.Y.S.2d 203, 133 N.E.2d 77, *appeal dismissed for want of a substantial federal question,* 352 U.S. 805 (1956); *Shaffer v. Carter, supra.*

However, these taxpayers argue that, because Texas has no income tax, they do not receive a reduction against any state income taxes for those federal exemptions and deductions allocated outside New Mexico, and that New Mexico's taxing scheme is therefore invalid as applied to them. This argument has never been adopted; the validity of New Mexico's tax does not depend on the present configuration of Texas' tax structure. *Austin v. New Hampshire, supra.*

In Section C of the Jurisdictional Statement, Appellants argue that New Mexico's rebate program is unconstitutional in denying to nonresidents the minimum rebates. The rebates challenged by the appellants were construed by the New Mexico Supreme Court to be measures designed to give relief from gross receipts taxes on necessity items to those who actually bear the burden of those taxes.[16] (Appendix "A," p. 4a). The question remaining is whether the distinction made between resident and nonresident is in pursuit of legitimate state interests. *Baldwin v. Fish & Game Commission of Montana,* 436 U.S. 371 (1978); *Davis v. Franchise Tax Board, supra.*

Ample evidence was produced at trial to support the reasonableness of the scheme. The legislature's residency requirement was based on the assumption that necessity items are usually purchased in the state in which one resides; the requirement that a claimant must have lived within New Mexico and outside a public institution for six months or more of a taxable year

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16 That construction of a state statute by the highest court of that state is not subject to review here. *Kingsley Int. Pic. Corp. v. Regents of N.Y.U.,* 360 U.S. 684 (1959).

insures that each rebate recipient has actually paid the gross receipts taxes he is refunded. (See Appendix "C," Findings of Fact Nos. 15-32). That a tax mechanism is inexact in its operation does not make it constitutionally invalid. *Saloman v. State Tax Commission,* 278 U.S. 484 (1929). A strikingly similar rebate scheme was reviewed and upheld by the Nebraska Supreme Court in the case of *Anderson v. Tiemann,* 182 Neb. 393, 155 N.W.2d 311 (1967); the Nebraska court rejected the precise arguments advanced by these appellants, and this Court dismissed the appeal for want of a substantial federal question, 390 U.S. 714 (1967).

CONCLUSION

Appellees respectfully submit that the questions upon which this cause depends are so unsubstantial as not to need further argument, and Appellees respectfully move the Court to dismiss this appeal, or, in the alternative, to affirm the judgment entered in the cause by the Supreme Court of New Mexico.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 3rd day of February, 1981, I, Sarah E. Bennett, a member of the bar of the Supreme Court, caused to be mailed, postage prepaid, three copies of the foregoing Motion to Dismiss or Affirm to Fred J. Morton, Counsel for the Appellants, at 210 N. Campbell, El Paso, Texas 79901. I further certify that all parties required to be served have been served.

Sarah E. Bennett

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